Mayban Trustee Bhd v Amalan Tepat Sdn Bhd & Anor

HIGH COURT (SEREMBAN) — ORIGINATING SUMMONS NO 24–76 OF 2003
LOW HOP BING J
21 NOVEMBER 2005

Civil Procedure — Action — Consolidation of actions — Whether common question of facts or law need to be shown — Rules of the High Court 1980 O 4 r 1(1)

This was the defendants' application by way of summons in chambers seeking an order to transfer the proceedings of the Melaka High Court Originating Summons No 24–202 of 2003 between Bank Pertanian Malaysia ('BPM') and Amalan Tepat Sdn Bhd, the first defendant herein ('the Melaka originating summons') to the Seremban High Court, and to consolidate the Melaka originating summons with the instant originating summons ('the Seremban originating summons'). The plaintiff's counsel submitted that there were no grounds for consolidation, as none of the conditions under O 4 r 1(1) of the Rules of the High Court 1980 had not been fulfilled and that the involvement of the same land in both the Melaka originating summons and the Seremban originating summons was not sufficient.

Held, dismissing defendants' application with costs:

(1) The only subject matter common to these two originating summonses relate to the same lands, but that per se does not come within O 4 r 1(1)(a) of the Rules of the High Court 1980 which prescribes the requirement of some common question of law or fact (see para 14).

(2) Although O 4 r 1(1)(a) of the Rules of the High Court 1980 was cited for the defendants, their learned counsel did not state the common question of fact or law that was to arise in the two originating summonses. Hence, quite apart from the common subject matter, the court was unable to accept the contention that O 4 r 1(1)(a) had been fulfilled (see para 15).

(3) The Seremban originating summons concerns the plaintiff's claim against the defendants for alleged breach of trust and damages incurred thereby on the basis of the trust deed dated 9 November 1993, whereas the Melaka originating summons was a charge action brought by a completely different plaintiff, ie BPM for an order for sale under O 83 of the Rules of the High Court 1980 pursuant to BPM's right as a registered chargee. These originating summonses were, therefore, entirely different and would certainly involve different issues and arguments on the basis of different facts and circumstances. Hence, they can hardly come within the ambit of O 4 r 1(1)(b) of the Rules of the High Court 1980 (see para 17).

[Bahasa Malaysia summary

Ini merupakan permohonan defendan melalui saman dalam kamar meminta satu perintah untuk memindah prosiding Mahkamah Tinggi Melaka Saman Pemula No 24–202 tahun 2003 antara Bank Pertanian Malaysia ('BPM') dan Amalan Tepat Sdn Bhd, defendan pertama ('saman pemula Melaka') kepada Mahkamah Tinggi Seremban dan menyatukan saman pemula Melaka dengan saman pemula semasa ('saman pemula Seremban'). Peguam plaintif berhujah bahawa tiada alasan untuk penyatuan kerana tiada syarat-syarat di bawah A 4 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 yang tidak dipatuhi dan penglibatan tanah-tanah yang sama dalam kedua-dua saman pemula Melaka dan Seremban adalah tidak memadai.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Satu-satunya perkara pokok yang sama dalam kedua-dua saman pemula adalah berkenaan tanah yang sama tetapi itu dengan sendirinya tidak terangkum di bawah A 4 k 1(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 yang menetapkan syarat-syarat persoalan undang-undang dan fakta yang sama (lihat perenggan 14).

(2) Walaupun A 4 k 1(1)(a) Mahkamah Tinggi 1980 telah digunapakai bagi defendan, peguam yang bijaksana tidak menyatakan persoalan fakta dan undang-undang yang sama yang patut ditimbulkan di dalam kedua-dua saman pemula. Malah, selain daripada perkara subjek yang sama, mahkamah tidak dapat menerima hujah bahawa A 4 k 1(1)(a) telah dipenuhi (lihat perenggan 15).

(3) Saman pemula Seremban adalah berkaitan dengan tuntutan plaintif terhadap defendan kerana pecah amanah yang dikatakan dan ganti rugi yang dikenakan berdasarkan surat ikatan amanah bertarikh 9 November 1993 manakala saman pemula Melaka adalah tindakan gadaian yang dimulakan oleh plaintif lain, iaitu BPM bagi satu perintah jualan di bawah A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 berikutan hak BPM sebagai pemegang gadaian berdaftar. Saman pemula-saman pemula tersebut adalah berlainan sama sekali dan tentu melibatkan persoalan dan hujah berdasarkan fakta-fakta dan keadaan yang berbeza. Justeru itu, kedua-duanya tidak boleh terangkum di bawah A 4 k 1(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 17).]

Notes

For cases on consolidation of actions, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 72–76.

Cases referred to

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244 (refd)

Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd [1973] 1 MLJ 31 (refd)

Legislation referred to
Rules of the High Court 1980 O 4 r 1(1), O 83

Wong Mae Foon (Shook Lin & Bok) for the plaintiff.
Lee Noushi (Gideon Tan Razali Zaini) for the defendants.

Low Hop Bing J:

APPLICATION

[1] This is the defendants' application by way of summons in chambers in encl (22) seeking an order to transfer the proceedings of the Melaka High Court Originating Summons No 24–202 of 2003 between Bank Pertanian Malaysia ('BPM') and Amalan Tepat Sdn Bhd, the first defendant herein ('the Melaka originating summons') to the Seremban High Court and to consolidate the Melaka originating summons with the instant originating summons ('the Seremban originating summons').

FACTUAL BACKGROUND

[2] In the Seremban originating summons, the plaintiff claimed that by a trust deed executed on 9 November 1993 between the first defendant ('the chargor'), the second defendant ('A'Famosa') and the plaintiff, the plaintiff was appointed to act as trustee for the members of the recreational club and golf course known as A'Famosa Golf Resort ('the Club').

[3] The chargor as owner of six lots of land ('the lands') by way of a lease in escrow leased a portion of the lands to A'Famosa for the development of the Club ('the golf project land').

[4] The chargor agreed, inter alia, that it will not encumber the golf project land in any way except with the plaintiff's prior written consent.

[5] Through the first supplemental trust deed executed on 18 October 1994 between the chargor, A'Famosa and the plaintiff, the chargor and the plaintiff consented to the charging of the lands, including the golf project land, to Malayan Building Society Bhd ('the MBSB charge') to secure facilities granted by MBSB to the chargor to which the plaintiff had consented, on the chargor's undertaking to discharge the golf project land as soon as it was practicable.

[6] The lands had been subdivided but the plaintiff alleged that the defendants failed to honour their obligations under the trust deed to have the lease over the golf project land registered, nor to discharge the MBSB charge and are allegedly in breach of the trust deed.

[7] The plaintiff's claim against the defendants are, inter alia, for damages and losses arising from the alleged breach of the trust deed and the first supplemental

trust deed, in allegedly failing to register the lease in favour of A'Famosa in respect of lots held under HS(D) 3810 to 3823, No PT 81 to 93, Mukim Pegoh, Melaka ('the affected lots') and in allegedly failing to keep the lands unencumbered.

[8] After the plaintiff's claim was filed, it was brought to the plaintiff's attention that the chargor had created a charge under presentation No 684/1996 Jilid 516 Folio 52 over the affected lots to secure a loan of RM30m granted to A'Famosa by BPM ('the BPM charge') allegedly without the plaintiff's prior written consent and allegedly in breach of the trust deed.

[9] BPM had instituted the Melaka originating summons to obtain an order for sale of the lands pursuant to the BPM charge which would include, inter alia, the golf project land.

[10] The defendant had also filed a similar application in the Melaka High Court to transfer the Melaka originating summons to the Seremban High Court and to consolidate the Melaka originating summons with the Seremban originating summons. The Melaka originating summons had been filed in Melaka High Court 2, and not in my court, ie Melaka High Court 1.

CONSOLIDATION

[11] Miss Wong Mae Foon, plaintiff's learned counsel submitted that there were no grounds for consolidation, as none of the conditions under O 4 r 1(1) of the Rules of the High Court 1980 has not been fulfilled and that the involvement of the same land in both the Melaka originating summons and the Seremban originating summons is not sufficient to obtain. Support was sought in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244.

[12] Defendants' learned counsel Miss Lee Noushi also relied on O 4 r 1(1) and *Central Securities*, in addition to *Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd* [1973] 1 MLJ 31, but added that there should be consolidation.

[13] In my judgment, it is necessary to refer to O 4 r 1(1) which reads as follows:

> Consolidation, etc of causes or matters (O 4 r 1)
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> (1) Where two or more causes or matters are pending, then, if it appears to the Court —
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> (a) that some common question of law or fact arises in both or all of them; or
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> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
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> (c) that for some other reason it is desirable to make an order under this rule the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

[14] In relation to O 4 r 1(1)(a), it was incumbent on the defendants to show that some common question of law or fact arose in the Melaka and the Seremban originating summons. The only subject matter common to these two originating summonses related to the same lands, but that per se did not come within O 4 r 1(1)(a) which prescribed the requirement of some common question of law or fact.

[15] Although O 4 r 1(1)(a) was cited for the defendants, their learned counsel did not state the common question of fact or law that was to arise in the two originating summonses. Hence, quite apart from the common subject matter, I am unable to accept the contention that O 4 r 1(1)(a) has been fulfilled.

[16] Order 4 r 1(1)(b) sets out the requirement that the rights to the relief claimed are in respect of or arise out of the same transaction or series of transactions. Instead of submitting on the defendants' fulfilment of this condition, defendants' learned counsel conceded that the reliefs applied for in the Melaka originating summons and the Seremban originating summons conflict with the interest of the respective plaintiffs.

[17] It is pertinent for me to point out that the Seremban originating summons concerns the plaintiff's claim against the defendants for alleged breach of trust and damages incurred thereby, on the basis of the trust deed dated 9 November 1993, whereas the Melaka originating summons was a charge action brought by a completely different plaintiff, ie BPM for an order for sale under O 83 of the Rules of the High Court 1980 pursuant to BPM's right as a registered chargee. These originating summonses are therefore entirely different and would certainly involve different issues and arguments on the basis of different facts and circumstances. Hence, they can hardly come within the ambit of O 4 r 1(1)(b).

[18] Relying on O 4 r 1(1)(c), it was argued for the defendants that it is desirable to make an order for consolidation as that would, inter alia, save costs and time for the parties and the court, besides being convenient to the solicitors. In my view, the saving of costs and time, and the solicitors' convenience are more illusory than real in view of the different plaintiffs, different causes of action, different issues and different arguments. I am therefore unable to see the merits of the defendants' contention based on O 4 r 1(1)(c).

[19] Actions may be consolidated where, eg the plaintiffs are the same and the defendants are the same: per Raja Azlan Shah CJ(Malaya) (now HRH The Sultan of Perak) in *Central Securities*, at p 251E left column. It is significant to note that this authority cited for the defendants would militate against the defendants as the Melaka originating summons and the Seremban originating summons involve different plaintiffs.

[20] Again, where the claims in two actions were between the same plaintiffs and substantially the same defendants and involve common question of facts, then consolidation would be eminently suitable: per Chang Min Tat J (later FCJ) in

A *Dell E Webb International Hotel Co* at p 34A–B and H left column. In my view, the facts and circumstances prevailing in this application do not attract the support of this authority cited for the defendants.

CONCLUSION

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[21] It is crystal clear that the Melaka originating summons and the Seremban originating summons do not come within the scope of O 4 r 1(1)(a), (b) or (c). I therefore hold that the defendants' application is devoid of merits. It is dismissed with costs of RM300 to the plaintiff.

C *Defendants' application dismissed with costs.*

Reported by K Krishnan

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